

REMARKS

Status of the Claims

Claims 26-32 are pending, with claim 26 being the only independent claim. Claim 25 is sought to be cancelled without prejudice to or disclaimer of the subject matter contained therein. Claim 26 has been amended by placing it in independent format. These new claims or amendments do not introduce new matter and their entry is respectfully requested.

Amendments to the Specification

Amendments to the specification have been made to comply with requirements of form. In particular, reference to ECACC accession no. 00012608 has been changed to V00012608, which is the accession number reflected on the deposit receipt provided herewith. The specification has also been amended to provide a more detailed address for the ECACC. It is not believed that these changes introduce any new matter, and their entry is respectfully requested.

Priority

The Examiner has indicated that the reference to the earlier filed application “should be **updated** as to reflect the latest status of the priority application.” Office Action, page 2 (emphasis in original). Applicants thank the Examiner and have provided herewith an amendment to the specification that updates the reference.

Rejection Under 35 U.S.C. § 112

Claims 25-32 stand rejected for lack of a statement indicating the extent of public availability of ECACC deposited samples under accession nos. 00020304 and V00012608. Office Action, page 2. Applicants thank the Examiner for pointing out that

If the deposit is made under the terms of the Budapest Treaty, then . . . a statement . . . stating that **the specific strains have been deposited under the Budapest Treaty and that the said strains will be irrevocably and without restriction or condition released to the public upon issuance of a patent**, would satisfy the deposit requirement made herein.

Office Action, page 2 (emphasis in original).

Applicants respectfully point out that such a statement need not be made by an attorney of record. Rather, the patent regulations provide that a representative registered patent attorney or agent can provide such a statement:

When a registered patent attorney or patent agent acting in a representative capacity appears in person or signs a paper in practice before the United States Patent and Trademark Office in a patent case, his or her personal appearance or signature shall constitute a representation to the United States Patent and Trademark Office that under the provisions of this subchapter and the law, he or she is authorized to represent the particular party in whose behalf he or she acts. In filing such a paper, the registered patent attorney or patent agent must specify his or her registration number and name with his or her signature. Further proof of authority to act in a representative capacity may be required.

37 C.F.R. § 1.34. The M.P.E.P. reiterates that such statements can be made by a registered patent attorney acting as a representative under 37 C.F.R. § 1.34:

In accordance with 37 CFR 1.34*, a paper filed by a registered patent attorney or agent in an application in which he or she is not of record *must* include * his or her *name* and registration number *with his or her signature*. Acceptance of papers filed in patent applications and reexamination proceedings by registered attorneys and agents upon a representation that the attorney or agent is authorized to act in a representative capacity is for the purpose of facilitating replies on behalf of applicants in patent applications and, further, to obviate the need for filing powers of attorney ** in individual applications or patents when there has been a change in composition of law firms or corporate patent staffs. Interviews with a registered attorney or agent not of record will, in view of 35 U.S.C. 122, be conducted only on the basis of information and files supplied by the attorney or agent. A person acting in a representative capacity may not sign >(A)< a power of attorney *(37 CFR 1.32(b)(4)), (B)< a document granting access to an application >(except where an executed oath or declaration has not been filed, and the patent practitioner was named in the papers accompanying the application papers - 37 CFR 1.14(c)), (C) a change of correspondence address (except where an executed oath or declaration has not been filed, and the patent practitioner filed the application - 37 CFR 1.33(a)), (D) a terminal disclaimer (37 CFR 1.321(b)(1)(iv)), or (E) a request

for an express abandonment without filing a continuing application (37 CFR 1.138(b))<.

M.P.E.P., 8th ed., § 402 (October 2005 revision).

The below signed registered patent attorney is authorized to act in a representative capacity for the purpose of facilitating replies on behalf of Applicants in the captioned patent application. Further to 37 C.F.R. § 1.808(a), biological samples corresponding to accession numbers V00012608 and 00020304 have been deposited with the ECACC under the terms of the Budapest Treaty. Subject to any contractual arrangements allowed under 37 C.F.R. §1.808(b), all restrictions imposed by the Applicants or Assignee of the captioned matter on the availability to the public of biological samples corresponding to accession numbers V00012608 and 00020304, deposited respectively on January 26, 2000 and February 3, 2000, with the ECACC (European Collection of Animal Cell Cultures), Centre for Applied Microbiology & Research, Porton Down, Salisbury, Wiltshire SP4 OJG, United Kingdom, will be irrevocably removed upon the granting of the captioned application as a patent. Applicants also provide herewith copies of the deposit receipt from the ECACC for these biological samples.

Accordingly, Applicants believe that the rejection of claims 25-32 under 35 U.S.C. § 112 is hereby rendered moot. Applicants respectfully request that the Examiner reconsider and withdraw the rejection.

Statutory Double Patenting

Claim 25 is rejected under 35 U.S.C. § 101 as “claiming the same invention as that of claim 20 of prior U.S. Patent No. 6,723,324 B2.” Office action, page 3. Solely to expedite prosecution and not in acquiescence to the rejection, Applicants have cancelled claim 25. Hence, this rejection is now moot.

Non-Statutory Double Patenting

Claims 25-32 are “rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 5, 6, 7, 9, 11-13 of U.S. Patent No. 6,723,324.” Office

Action, page 3. Applicants respectfully traverse this rejection.

Claims 25-32 correspond respectively to claims that were part of a non-elected group designated in a Restriction Requirement in U.S. Application No. 09/793,873 (now U.S. Patent No. 6,723,324), which application is relied upon by the captioned application for the benefit under 35 U.S.C. §120. In particular, claims 25-32 correspond to claims 18, 26-28, 33, 35, 39 and 41, which are all a part of non-elected Group II in the parent application.¹ See U.S.S.N. 09/793,873, Restriction Requirement mailed on May 16, 2002, page 2; and Response to Restriction Requirement filed by facsimile on May 23, 2002.

Because the claims of the captioned application correspond to non-elected claims of a parent application, an obviousness-type double patenting rejection of the pending claims in light of the parent issued patent is improper. This is specifically stated in the patent statutes:

A patent issuing on an application with respect to which a requirement for restriction under this section has been made, or on an application filed as a result of such a requirement, shall not be used as a reference either in the Patent and Trademark Office or in the courts against a divisional application or against the original application or any patent issued on either of them, if the divisional application is filed before the issuance of the patent on the other application.

35 U.S.C. §121. See also M.P.E.P., 8th ed., § 804.01: "Prohibition of Double Patenting Rejections Under 35 U.S.C. 121" (Oct. rev., 2005).

Accordingly, Applicants respectfully request that the Examiner reconsider and withdraw the non-statutory double patenting rejection of claims 25-32.

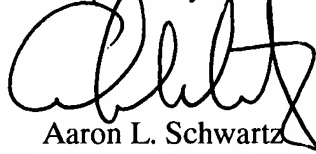
¹ The claims of non-elected Group II can be found in the Preliminary Amendment filed on February 27, 2001 in U.S.S.N. 09/793,873.

CONCLUSION

Applicants do not believe that any other fee is due in connection with this filing. If, however, Applicants do owe any such fee(s), the Commissioner is hereby authorized to charge the fee(s) to Deposit Account No. 02-2334. In addition, if there is ever any other fee deficiency or overpayment under 37 C.F.R. §1.16 or 1.17 in connection with this patent application, the Commissioner is hereby authorized to charge such deficiency or overpayment to Deposit Account No. 02-2334.

Applicants submit that this application is in condition for allowance, and request that it be allowed. The Examiner is requested to call the Undersigned if any issues arise that can be addressed over the phone to expedite examination of this application.

Respectfully submitted,



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